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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 403

LLOYD BRIGGS, DOROTHY BRIGGS, ELSON BRICKEY, FRANCIS BRICKEY, for themselves and others similarly situated,

Respondents,

vs.

PAUL S. SAGERS, Director, AMERICAN FORK TRAINING SCHOOL, HERBERT F. SMART, Director Finance, STATE OF UTAH, and the STATE OF UTAH, a sovereign,

Petitioners.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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---

The Attorney General of Utah, on behalf of the petitioners, petitions that a writ of certiorari be granted to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on April 7, 1970.

OPINIONS BELOW

The opinion of the District Court for the Central District of Utah (Appendix infra, pp. i-iii) is reported at 301 F. Supp. 1023 (1969). The opinion of the Court of Appeals for

the Tenth Circuit, three judges participating; (Appendix infra, p. iii) is reported at 424 F. 2d 130 (1970).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was made and entered on April 7, 1970, and a copy thereof is appended to this petition in the Appendix at pp. iii-xii. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

I

Whether, notwithstanding the provisions of the Eleventh Amendment and in the absence of an express waiver of immunity by the state, a United States court has jurisdiction to adjudicate an overtime claim under the Fair Labor Standards Act of 1938, as amended (29 U. S. C. A. Sec. 201 et seq.) brought by a citizen-employee of a state institution created and maintained by the state for custody and treatment of mentally deficient children and adults.

II

Whether there is a distinction under the Eleventh Amendment between state governmental and state proprietary activities which limits Congress to providing for suits to permit enforcement of its acts based on the commerce clause to strictly proprietary functions and not to purely governmental functions.

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULE INVOLVED

United States Constitution, Article I, Section 8
United States Constitution, Amendment XI
29 U. S. C. 203(d), 203(s)(4), 216, 217
United States Supreme Court Rule 19

STATEMENT OF THE CASE

The American Fork Training School, an institution created and maintained by the State of Utah for the custody and treatment of mentally deficient children and adults, commenced its operations in 1931 and has been furnishing such services ever since. The plaintiffs are employees of that institution and citizens of the State of Utah. They filed this suit against that institution, its director, the State of Utah and the State Director of Finance based on the Fair Labor Standards Act of 1938, 29 U. S. C. § 216 (b). The claims in question are statutory causes of action based on certain amendments adopted by Congress in 1966, Public Law 80-601, 80 Stat. 830, 29 U. S. C. § 203 (s) (4) as amended 1966, effective February 1, 1967, which purported to extend the Act's coverage to state mental institutions such as the one in question. The provisions of 29 U. S. C. § 203 (d) as amended 1966, effective February 1, 1967, expanded the definition of covered employers to include the states and their political subdivisions with respect to such institutions.

The defendants moved to dismiss the complaint for lack of jurisdiction based on the Eleventh Amendment to the United States Constitution. After due consideration the District Court for the Central District of Utah granted the motion and dismissed the complaint on July 11, 1969, because "under the Eleventh Amendment to the Constitution of the United States and the antecedent rule of immunity which it recognizes, [the District] court has no jurisdiction to adjudicate the claims here asserted." (App. pp. i-iii.)

The court below reversed the District Court, basing its decision on *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964), and also upon the theory of implied consent of the State to suit

as espoused in that case. (App. p. iii.) That court held that "Utah, by having continuously operated the American Fork Training School after February 1, 1967, effective date of the FLSA Amendments, has indulged in an endeavor subject to federal regulation and having done so, has waived its immunity and consented to suits permitted by the FLSA." (App. p. xii, 424 F. 2d at p. 134.)

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed and reversed because it erroneously applies the power of Congress under the commerce clause through the Fair Labor Standards Act to nullify the principle of sovereign immunity as established in the Eleventh Amendment to the Constitution of the United States. In doing so, that court "has decided an important question of federal law which has not been but should be settled by this court." Rule 19 (1) (b) U. S. Supreme Court Rules.

In the present case the decision of the court below clearly presents to this Court for its decision a direct conflict between two constitutional provisions which must be reconciled. This case, in fact, represents the very vital identical question that this Court anticipated would be presented to it for decision since it was expressly preserved in *Maryland* v. *Wirtz*, 392 U. S. 183, (1968), as stated by MR. JUSTICE HARLAN, at p. 200:

> "Percolating through each of these provisions for relief are interests of the United States and problems of immunity, agency, and consent to suit. Cf. *Parden* v. *Terminal R. Co.*, 377 U. S. 184. *The constitutionality of applying the substantive requirements of the Act to the States is not, in our view, affected by the possibility that one or more of the remedies the Act provides might not be available when a State is the*

> *employer-defendant* . . . [W]e decline to be drawn into an abstract discussion of the numerous complex issues that might arise in connection with the Act's various remedial provisions. They are almost impossible and most unnecessary to resolve in advance of particular facts, stated claims, and identified plaintiffs and defendants. *Questions of state immunity are therefore reserved for appropriate future cases.*" (Emphasis supplied.)

The present case is a suit for damages involving an individual suing the state as an employer-defendant. This raises the compelling Eleventh Amendment immunity issue on which this Court in *Maryland* v. *Wirtz* refused to rule in the absence of an appropriate factual situation. Now the present fact situation precisely represents an "appropriate future case" for which determination was reserved.

The court below erroneously based its opinion on the doctrine of *implied consent* to be sued as espoused in *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964). It has misconstrued this Court's holding in that case and refused to acknowledge the obvious factual differences that distinguish that case from the present controversy. *Parden* involved (1) a *proprietary*, not *governmental* activity, and (2) the activity in *Parden* was not commenced until 20 years after the Congressional enactment was passed. The court below noted that this Court made no distinction in *Maryland* v. *Wirtz* between "governmental" and "proprietary" (App. p. iii), but if in fact the *Maryland* decision made no such distinction does not mean that such a distinction is never to be made. Indeed, it is a distinction often made in private suits against states. The *Maryland* case involved a declaratory judgment on the general constitutionality of the Act involved without relation to specific facts. It could be that a distinction between "governmental" and "proprietary" activities is not

applicable in such a case, but in the *Parden* case, this Court was careful to point out that there is an obvious distinction between governmental state activities and those activities which generally involve private enterprise when it stated

> "But when a State leaves the sphere that is exclusively its own and enters into activities subject to intergovernmental regulation, it subjects itself to that regulation as fully as if it were a private person or corporation. (*South Carolina v. United States*, 199 U. S. 437, 463; *New York v. United States*, 326 U. S. 572.)" (*Parden v. Terminal R. Co.*, supra, at 196.)

In fact this distinction was made clearly significant in the determination of that case.

The Court below also disregarded another significant factual basis of *Parden*

> "Although Parden does rely in part upon an intervening lapse of twenty years, it is not so crucial to the principles involved as to cause reversal absent that fact." (App. p. xi.)

The majority opinion in *Parden* clearly indicates that, though express waiver of sovereign immunity was not involved, the [illegible] before the State ever began the railroad [illegible] factual basis for the outcome of that case, this [illegible]

> "It remains the law that a State may not be sued by an individual without its consent. Our conclusion is simply that Alabama, when it began operation of its interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act." (*Parden*, supra, p. 192.)

[illegible] to make the *Parden* case control the present controversy [illegible] the factual basis of that case is unimportant

to comply, ignoring the clear language of this Court in that opinion. This unwarranted expansion of the holding in *Parden* must be reviewed and corrected if the Eleventh Amendment is to be given its full force and effect in preserving, as it was intended to do, the sovereign immunity of all the states from suit without the consent, which cannot impliedly or expressly be found present in this case.

However, whether the *Parden* case was misapplied or not, to so emphasize it with the emphasis result by the court below is to ignore entirely the relationship between the federal government under the commerce clause and a state's sovereign immunity under the Eleventh Amendment. *Parden* should be either distinguished on its facts, or, if the holding of the *Parden* case is found to have contemplated such a situation, that case should be re-examined.

The ultimate consequence of this case is the impact on the funds involved. Four individuals are seeking to obtain money indirectly from the State to be necessarily paid out of tax dollars to the exclusion of other legitimate state needs. Seventy (70%) per cent of the entire budget appropriation for the American Fork Training School comes from the General Fund of the State. The $102,112, plus attorney's fees, claimed by the plaintiffs represents nearly 5% of the total estimated 1969-1970 salary expenditure of $2,055,706 for that institution. This would go to four individuals out of the 500 to 600 persons employed from time to time by that institution. By projecting this result into all the areas the Fair Labor Standards Act purports to control, the potential drain on state tax dollars becomes staggering, both in amount and unconstitutionality.

If Congress has power over all subjects that "affect commerce" and can give an individual a cause of action against

a State, even in a case involving a *governmental* activity as the one involved here in which no consent to suit has been given, then, in light of the expansive application of the commerce clause, there is no conceivable situation in which Congress could not grant an individual a private cause of action against the state and the Eleventh Amendment thus becomes inoperable, which was never intended. The state would only have the option of consenting to suit or withdrawing completely from an area of traditional state activities as to all of its branches of government whether, as in this case, training and caring for the mentally deficient or in any other governmental activities. In fact, it is obvious that this result completely nullifies the Eleventh Amendment to the United States Constitution. Therefore, in the circumstances, it is respectfully submitted that this Court should not hesitate to review the vital constitutional questions involved in the present case, and to harmonize these two constitutional provisions so that the respective governmental powers here presented will be clearly defined.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney General,
State of Utah

ROBERT B. HANSEN
Deputy Attorney General

JOSEPH P. McCARTHY
Chief Assistant Attorney General

Attorneys for Petitioners

APPENDIX

No. C 34-69.

United States District Court, D. Utah, C. D.

July 10, 1969. [301 F. Supp. 1023.]

Lloyd BRIGGS, et al., for themselves and others similarly situated, *Plaintiffs*,

v.

Paul S. SAGERS, Director, American Fork Training School, Herbert F. Smart, Director of Finance, and the State of Utah, a sovereign, *Defendants*.

Action by state employees to recover overtime pay. The District Court, Christensen, J., held that court lacked jurisdiction to entertain such action.

Dismissed.

Courts Key 303(2)

Federal court did not have jurisdiction to entertain action to recover overtime pay brought by state employees against state. Fair Labor Standards Act of 1938, §§ 7, 16(b), 29 U. S. C. A. §§ 207, 216(b); U. S. C. A. Const. Amend. 11.

Gerald G. Gundry, and Cornelius Van Drunen, Salt Lake City, Utah, for plaintiffs.

Vernon B. Romney, Atty. Gen., of State of Utah, for defendants.

MEMORANDUM DECISION

CHRISTENSEN, District Judge. (301 F. Supp. 1023.)

The plaintiffs have brought this action to recover unpaid overtime compensation and an additional equal amount as liquidated damages in reliance upon Section 16(b) of the Fair Labor Standards Act of 1938, 29 U. S. C. § 216(b). Jurisdiction is laid under 28 U. S. C. § 1337 giving a district

court original jurisdiction of all suits arising under any law regulating commerce, without regard to citizenship or the amount in controversy.

It is alleged that the defendant State of Utah has been and is engaged in the operation of the American Fork Training School, an institution created and maintained for the custody and treatment of mentally deficient children and adults; that plaintiffs were employed by the State as attendants in various cottage living units of the school and that from February 1, 1967, the effective date of the 1966 amendment to the Act relied upon, to the present time, plaintiffs have performed overtime work for which no additional compensation has been paid, in violation of the provisions of the Act. Plaintiffs seek to recover under 29 U. S. C. § 207 against the State of Utah overtime compensation, doubled, together with reasonable attorneys' fees and costs.

The State has moved to dismiss the complaint on several grounds, only one of which needs to be considered here.

I am convinced that under the Eleventh Amendment to the Constitution of the United States and the antecedent rule of immunity which it recognizes, this court has no jurisdiction to adjudicate the claims here asserted. Hans v. Louisiana, 134 U. S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890). This question was reserved in Maryland v. Wirtz, 392 U. S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968), which fully discusses the general problem and, in upholding the denial of injunctive and declaratory relief to the state in advance of the development of specific fact situations, leaves other questions open in this case even assuming jurisdiction.

Yet, the matter of jurisdiction is decisive before this court. Despite individual defendants named, the suit is wholly

against the State of Utah in substance and would have direct impact upon the funds and fiscal management of the State. Under no theory can it be said that sovereign immunity has been waived by the State.[1] *See also* Board of Education, etc. v. State of Oklahoma, et al., 409 F. 2d 665 (10th Cir. 1969), and Hamilton Mfg. Co. v. Trustees of State Colleges in Colo., 356 F. 2d 599 (10th Cir. 1966). *Cf.* Kennecott Copper Corp. v. State Tax Commission, 327 U. S. 573, 66 S. Ct. 745, 90 L. Ed. 862.

Dismissed for lack of jurisdiction.

No. 473-69.

United States Court of Appeals, Tenth Circuit.
April 7, 1970. [424 F. 2d 130.]

Lloyd BRIGGS, Dorothy Briggs, Elson Brickey, Francis Brickey, for themselves and others similarly situated, *Plaintiffs-Appellants*,

v.

Paul S. SAGERS, Director, American Fork Training School, Herbert F. Smart, Director Finance, State of Utah, and the State of Utah, a sovereign, *Defendants-Appellees*.

Employees of state-owned institution for the treatment of mentally defective persons instituted suit pursuant to the Fair Labor Standards Act to recover unpaid overtime compensation and an additional equal amount as liquidated damages. The United States District Court for the District of Utah, Central Division, A. Sherman Christensen, J., 301 F. Supp. 1023, dismissed the suit for want of jurisdiction, and

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[1] Parden v. Terminal R. Co., 377 U. S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964), has distinguishing features which themselves underscore the absence of an implied consent in this case. Here involved, among other things, is a governmental activity which antedated the legislation relied upon by plaintiff. And to hold that there was a constructive waiver in this case would tend to render almost any suit by an individual against the state on a federal claim involving commerce cognizable in a federal court in unjustifiable circumvention of the Eleventh Amendment.

an appeal was taken. The Court of Appeals, Hill, Circuit Judge, held, inter alia, that when Utah continued its operation of the institution, knowing of the passage of the 1966 amendments to the Fair Labor Standards Act extending minimum wage and maximum hours provisions to employees of that institution and seemingly making Utah amenable to suit in federal court by the individual employees, Utah waived its immunity to the remedies provided in the Act.

Reversed and remanded for further proceedings.

1. Courts Key 303(2)

Congress was authorized to create, in the Fair Labor Standards Act, a private cause of action to recover wages due from state employers and to make that right immediately effective on pre-existing activities. Fair Labor Standards Act of 1938, §§ 1 et seq., 16(b) as amended 29 U. S. C. A. §§ 201 et seq., 216(b); U. S. C. A. Const. Amend. 11.

2. Courts Key 303(2)

Although the Eleventh Amendment did not in terms apply to the instant case (a suit by state employees to recover overtime pay pursuant to the Fair Labor Standards Act) since the defendant state was being sued by its own citizens, the premise of that Amendment has been extended to cover such exigency. Fair Labor Standards Act of 1938, §§ 1 et seq., 16(b) as amended 29 U. S. C. A., §§ 201 et seq., 216(b); U. S. C. A. Const. Amend. 11.

3. Commerce Key 8(1)

In the realm of interstate commerce, the congressional authority is supreme and conflicting state interests and rights must yield.

4. States Key 4.16

Federal government, when acting within a delegated power, may override countervailing state interests whether those be described as "governmental" or "proprietary" in character.

5. Courts Key 361

Question of whether Utah's continued participation in

a sphere of authority subject to the constitutional power of the federal government amounted to consent was one of federal law.

6. United States Key 22

Regulatory power of Congress, though limited to constitutionally defined matters, is plenary as to those matters.

7. Courts Key 303(1)

When Utah continued its operation of institution for the mentally defective, knowing of the passage of the 1966 amendments to the Fair Labor Standards Act extending minimum wage and maximum hours provisions to employees of the institution and seemingly making Utah amenable to suit in federal court by individual employees, Utah waived its immunity to the remedies provided in the Act. Fair Labor Standards Act of 1938, §§ 1 et seq., 16(b) as amended 29 U. S. C. A. §§ 201 et seq., 216(b); U. S. C. A. Const. Amend. 11.

8. Courts Key 303(1)

When Congress constitutionally hinges the right of a state to engage in interstate commerce upon its amenability to a federal court suit by private parties, the states must decide eo instante whether to continue or withdraw.

Ronald Rosenberg, Washington D. C. (Eugene Gressman, Washington, D. C., Gerald G. Gundry and C. Van Drunen, Salt Lake City, Utah, on the brief), for appellants.

Robert B. Hansen, Deputy Atty. Gen., Salt Lake City, Utah (Vernon B. Romney, Atty. Gen. of Utah, Salt Lake City, Utah, on the brief), for appellees.

Before MURRAH, Chief Judge, and HILL and HICKEY, United States Circuit Judges.

HILL, Circuit Judge.

The appellants instituted this suit pursuant to the Fair Labor Standards Act, to recover unpaid overtime compensa-

tion and an additional equal amount as liquidated damages. Jurisdiction was alleged under 29 U. S. C. § 216(b) and 28 U. S. C. § 1337. Primarily on grounds of its sovereign immunity, the State of Utah moved to dismiss for want of jurisdiction. Convinced that the suit was primarily directed against the State of Utah, the District Court held that Utah had not waived its immunity and therefore, "under the Eleventh Amendment to the Constitution of the United States and the antecedent rule of immunity which it recognizes, this court has no jurisdiction to adjudicate the claims here asserted."

1, 2] Factually, this lawsuit was commenced by Utah citizens who are employees of the American Fork Training School, a Utah-owned institution for the custody and treatment of mentally deficient children and adults. The basis for the controversy is in the 1966 amendments to the Fair Labor Standards Act which effectively extended the minimum wage and maximum hours provisions to the complaining workers.[1]

[1] 29 U. S. C. A. § 203(s) (4) (Supp. 1970):

"(s) 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

"(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children * * * (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit);"

[2] 29 U. S. C. A. § 203(d) (Supp. 1970):

"(d) 'Employer' * * * shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed [1] in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section * * *) * * *."

and would seemingly make Utah amenable to suit in federal court by individual employees.[2] The difficult question of jurisdiction posed to this court embroils "interests of the United States and problems of immunity, agency, and consent to suit." Maryland v. Wirtz, 392 U. S. 183, 200, 88 S. Ct. 2017, 2025, 20 L. Ed. 2d 1020 (1968). In its most concise expression, the issue is the authority of Congress to statutorily create a private cause of action to recover wages due from state employers and to make that right immediately effective on preexisting activities. The inevitable confrontation squares the power of Congress to regulate interstate commerce under the commerce clause against the Eleventh Amendment right of the states to be free from federal court suit, absent consent.[3] Although the Eleventh Amendment does not in terms apply to this case because the defendant state is being sued by its own citizens, the premise of the Amendment has been extended to cover this exigency. Hans v. Louisiana, 134 U. S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890).

[3] The theory upon which appellants predicate their right to sue Utah is that of implied consent to suit, as that doctrine was espoused in Parden v. Terminal Railway of Alabama State Docks Department, 377 U. S. 184, 84 S. Ct. 1207, 12 L. Ed 2d 233 (1964). That was a suit in which Alabama citizens sued an Alabama-owned railway in federal court to recover as employees under the Federal Employers' Liability Act. Alabama contended that Congress was without constitutional authority to subject a state to private suit un-

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[2] 29 U. S. C. A. § 216(b).

[3] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

der the FELA because of the Eleventh Amendment guarantee. The Supreme Court held that Congress intended in FELA to condition the States' right to operate railroads in interstate commerce upon a waiver of the States' sovereign immunity to private suits in a federal forum. The Court then discussed the congressional power to impose such a condition on state activity. It was lucidly stated that in the realm of interstate commerce, the congressional authority is supreme and conflicting state interests and rights must yield.[4] The Act authorizes suits against "every common carrier by railroad while engaging in commerce" and the Court decided that by engaging in interstate railroading twenty years after FELA was enacted, Alabama had impliedly waived its immunity to private suits under the Act. The Court reasoned thusly: "By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus consented to suit."[5]

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[4] "While a State's immunity from suit by a citizen without its consent has been said to be rooted in 'the inherent nature of sovereignty.' Great Northern Life Ins. Co. v. Read, supra, 322 U. S. 47, 51, 64 S. Ct. 873, 875, [88 L. Ed. 1121] the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." [at 191, 84 S. Ct. at 1212].

"By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign community [*sic*]." [at 192, 84 S. Ct. at 1212].

[5] Parden v. Terminal Ry., 377 U. S. at 192, 84 S. Ct. at 1213.

The same proposition as presented by appellants in Parden is now being asserted by appellants in the instant controversy and absent prevailing reasons to the contrary, we think that decision to be dispositive of the issue confronting us. Appellees respond that Parden is not controlling for two reasons: (1) the regulated activity here is governmental in nature; and (2) Utah cannot be said to have waived its immunity because it was operating the institution prior to the passage and effective date of the 1966 Amendments.

[4] In Maryland v. Wirtz, supra, the Supreme Court concluded that the substantive portions of the 1966 FLSA Amendments were constitutionally permissible regulations on state activities. In the course of that opinion it was made clear "that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character."[6] We think that rudimentary principle adequately disposes of appellees' first attempt to distinguish the Parden case.

In the Parden case, Alabama became engaged in interstate commerce some twenty years after the FELA was enacted. Appellees contend that it was upon that fact that the Court found an implied waiver of immunity. Here the State of Utah has operated the institution since 1931 and the argument seems to be that because the State was not originally put to the choice of entering the field and thereby waiving its immunity, or staying out of the endeavor, subsequent amendments to the FLSA should not impose an immediate waiver on the basis of continued activity. Appellants suggest

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[6] Maryland v. Wirtz, 392 U. S. 183, 195, 88 S. Ct. 2017, 2023, 20 L. Ed. 2d 1020 (1968).

that since Utah has knowingly and directly continued to operate in interstate commerce subsequent to the 1966 FLSA amendments, the State, *ipso facto*, must be deemed to have consented to suits authorized by the Act.

[5, 6] The question of whether Utah's continued participation in a sphere of authority subject to the constitutional power of the federal government amounted to consent, is one of federal law.[7] Citizens Committee for Hudson Valley v. Volpe, 297 F. Supp. 809 (S. D. N. Y. 1969) is extensively cited in appellees' brief but is of little assistance to their case. That controversy is easily distinguished on the grounds that no cause of action was given to the plaintiffs by the statutes in question. In such circumstances the court was properly reluctant to imply New York's consent to a suit not provided for in the governing act. Other authorities cited by the parties are of little aid to the court since the cases either deal with state activity commenced after the controlling act's passage[8] or there is no indication as to when the activity was first begun.[9] Nonetheless, we think the express intent of Congress and the language of Parden must control the matter. The regulatory power of Congress, although limited to constitutionally defined matters, *e. g.*, interstate commerce, is plenary as to those matters.[10] Since the FLSA was enacted

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[7] Parden v. Terminal Ry., 377 U. S. 184, 196, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964); Chesapeake Bay Bridge and Tunnel Dist. v. Lauritzen, 404 F. 2d 1001 (4th Cir. 1968).

[8] Lauritzen v. Chesapeake Bay Bridge and Tunnel Dist., 259 F. Supp. 633 (E. D. Va. 1966), *rev'd on other grounds*, 404 F. 2d 1001 (4th Cir. 1968).

[9] Huckins v. Board of Regents of Univ. of Michigan, 263 F. Supp. 622 (E. D. Mich. 1967); Cocherl v. State of Alaska, 246 F. Supp. 328 (D. Alaska 1965).

[10] Parden v. Terminal Ry., 377 U. S. 184, 191, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964); United States v. California, 297 U. S. 175, 56 S. Ct. 421, 80 L. Ed. 567 (1936); Gibbons v. Ogden, 9 Wheat. 1, 196-197, 6 L. Ed. 23, 70 (1824).

through the authority of the Commerce Clause,[11] and inasmuch as the right of action imposed by the FLSA is fully within the congressional regulatory power, it would be incongruous to deny Congress the power to name a prompt, effective date for such amendments. To suppress that corresponding power would run counter to the plenary nature of the constitutionally defined regulatory authority and could, in part, defeat the purpose of urgently required legislation.

The legislative history of the 1966 FLSA Amendments reflects that passage was to attain a "minimum standard of living necessary for health, efficiency, and general well-being of workers * * * with all deliberate speed consistent with the policy of the act and the welfare of the American people."[12] This demonstrates to our satisfaction that Congress contemplated the financial burden that the Amendments could cause for the states. But the overall purpose of the FLSA tacitly suggests that the imposition of such strain is outweighed by the underlying policy of the Act. In sum, what Congress has done is within constitutional bounds and, as such, will not be disturbed by the Judiciary.

[7] Although Parden does rely in part upon an intervening lapse of twenty years, it is not so crucial to the principles involved as to cause reversal absent that fact. Appellees' interpretation of the case implies that because there was a twenty year delay in commencing the interstate business, Alabama must have made a knowing and intelligent waiver. If that were true, we think the twenty year language would increase in significance. However, the argument is

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[11] Maryland v. Wirtz, 392 U. S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968).

[12] 2 U. S. Cong. and Admin. News, 1966, at p. 3004.

unpersuasive in light of Alabama's contention that the State did not intend to waive its immunity or know that such a waiver would result. Furthermore, even the dissent in Parden did not view the opinion as pivoting on the fact of an intentional waiver. Rather, the dissenting Justices understood the majority to hold "that with regard to sovereign immunity, waiver of a constitutional privilege need be neither knowing nor intelligent."[13] Under that rule, we think it sufficient that when Utah continued its operation of the institution, knowing of the passage of the 1966 Amendments, it waived its immunity to the remedies provided in the Act.

[8] When Congress constitutionally hinges the right of a State to engage in interstate commerce upon its amenability to a federal court suit by private parties, the States must decide *co instante* whether to continue or withdraw. If, because of an immediate effective date on an enactment, a State is unable to make a timely withdrawal, and is caught in a bona fide attempt to withdraw, a situation might be presented so as to call for different results. But here it was never made manifest by Utah's actions that it had not decided to continue and thus render itself suable. In fact, the contrary appears quite clearly from its subsequent adherence to the substantive portions of the FLSA.

Utah, by having continuously operated the American Fork Training School after the February 1, 1967, effective date of the FLSA Amendments, has indulged in an endeavor subject to federal regulation and having done so, has waived its immunity and consented to suits permitted by the FLSA.

The case is reversed and remanded for further proceedings.

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[13] Parden v. Terminal Ry., 377 U. S. at 200.

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Petition for Writ of Certiorari to Eugene Gressman, Esq. and Ronald Rosenberg, Esq., 1730 K Street, N. W., Washington, D. C. 20006, and to Gerald G. Gundry, Esq., Kennecott Building, Salt Lake City, Utah, and to C. Van Drunen, Esq., 243 East 4th South, Salt Lake City, Utah, Counsel of Record for the Respondents, by depositing the same in a United States post office mail box, with first class postage prepaid, addressed to said Counsel of Record for the Respondents, at their post office addresses hereinabove set forth, on this 16th day of July, 1970.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 403

PAUL S. SAGERS, ET AL., *Petitioners,*

v.

LLOYD BRIGGS, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court Appeals for the Tenth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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August 14, 1970

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents oppose the petition for writ of certiorari on two grounds:

1. The Untimely Filing of the Petition Deprives This Court of Jurisdiction Over the Case.

The petition for writ of certiorari is plainly out of time. The judgment of the Tenth Circuit was entered on April 7, 1970, simultaneously with its opinion. No rehearing was sought or denied. Thus, pursuant to the command of 28 U.S.C. § 2101(c), the writ of certiorari had to be sought "within ninety days after the entry of such judgment or decree"—in other words, by no later than July 6, 1970. And no extension of

that filing deadline was sought or obtained from a Justice of this Court.

The petition was actually filed in this Court on July 15, 1970, nine days after the expiration of the deadline. Where, as here, the time for filing a petition is established by an Act of Congress rather than a Rule of this Court, such an untimely filing has consistently been held to be a jurisdictional defect, making it impossible for the Court to waive the untimeliness or to entertain the petition. As stated in *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942), such a petition "must . . . be denied for want of jurisdiction." See also, *Teague* v. *Commissioner of Customs*, 394 U.S. 977 (1969); cf. *Schacht* v. *United States*, 398 U.S. 58, 63-65 (1970), where only last Term this Court emphasized that a waiver of untimeliness can be made only where a Rule of this Court, rather than a statute, establishes the time requirement.[1]

2. The Decision Is Obviously Correct and Involves No Conflict of Opinion or Other Basis for Review by this Court.

Even apart from the untimeliness of the petition, no reason is apparent for review of the decision below. While this Court in *Maryland* v. *Wirtz*, 392 U.S. 183, 200 (1968), did reserve questions of state immunity "for appropriate future cases," it did not thereby imply that all questions of state immunity stemming from suits under the Fair Labor Standards Act would necessarily qualify for review by this Court.[2] Some

[1] Even if a waiver were permissible, no excuse or extenuating circumstance has been advanced by petitioners to justify a waiver.

[2] The Court's reference to "numerous complex issues that might arise in connection with the Act's various remedial provisions" obviously relates to issues more complex than here involved.

of those questions might be correctly resolved by a lower court so as to make this Court's expenditure of time to review the matter totally unnecessary. Such is this case.

The correctness of the decision below is largely self-evident from the Tenth Circuit's opinion. The decision rests squarely upon a proper application of the principle enunciated by this Court in *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964), that when Congress in fact exercises its power over States under the Commerce Clause the States cannot interpose their sovereign power in the form of immunity from suit where such suit is necessary and appropriate to implement the Congressional regulation.

The petitioners would seek to avoid *Parden* on two grounds: (1) the existence of a so-called proprietary activity in *Parden*, as distinguished from a so-called governmental activity in this case, and (2) the commencement of the state activity in *Parden* some 20 years after the Congressional statute was enacted, as contrasted with Utah's involvement in the activities here at stake long before the 1966 amendments to the Fair Labor Standards Act. Neither distinction is meritorious or decisive.

The decision of this Court in *Maryland* v. *Wirtz*, *supra*, 195, disposed of the first suggested distinction by ruling that when the Federal Government acts within its delegated power it "may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character." As to the second suggested distinction, the court below recognized that it would be an intolerable proposition to maintain that Congress is constitutionally inhibited

from insisting upon a waiver of state sovereign immunity as to state operations already in effect at the time of enacting constitutionally permissible controls over those operations. If Congress has the power under the Commerce Clause to subordinate that immunity in the interests of making effective the supreme federal enactment, then the Commerce Clause admits of no distinction as to the time when the federal control is adopted. The Commerce Clause, in short, "acknowledges no limitations other than are prescribed in the constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196 (1824).

The critical factor in this case, as the Tenth Circuit recognized, is that "when Utah continued its operation of the institution, knowing of the passage of the 1966 Amendments, it waived its immunities to the remedies provided in the Act." Pet. App. xii. At the point when Congressional controls are imposed, the State "must decide *eo instante* whether to continue or withdraw," Pet. App. xii, with respect to the regulated activities. Having determined to continue those activities in this instance, Utah cannot now claim immunity from suit. Such is the inescapable logic of the *Parden* ruling.

It need only be added that this Court was unanimous in *Parden* as to the controlling constitutional principles, so accurately applied here by the Tenth Circuit. What divided this Court in *Parden* was an evaluation of whether Congress, in the Federal Employers' Liability Act, meant to effect an automatic and compulsory waiver of immunity. No such issue is here present as to the 1966 amendments to the Fair Labor Standards Act. *Maryland* v. *Wirtz* makes it clear that Congress did intend to impose its full Com-

merce Clause power over state activities, thus necessarily effecting a waiver of immunity wherever necessary to effectuate the Congressional program.

There is no conflict alleged as to the foregoing propositions, thus implementing the appropriateness of the denial of certiorari.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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August 14, 1970